9 Implementation Issues and Concerns

Acquisition of water from the upper Snake River basin for use in the lower Snake River to augment flows for salmon migration poses a number of problems for the residents of the area, the states, tribes, and the Federal government. Chapters 5-8 discuss major resource, economic, and other effects that could occur if the 1427i and 1427r scenarios identified in this analysis were implemented. This chapter focuses mainly on the socio-economic and state water law based concerns and issues. There are separate ESA, National Environmental Policy Act (NEPA), CWA, and Wild and Scenic River Act related concerns that are largely matters of federal purview that would also need to be addressed. Since this document is prepared under the auspices of Federal law, and will serve to implement a Federal decision (albeit with strong input from states, tribes, and the general public), the Federal law based conflicts are assumed to be resolvable in the Federal government's implementation actions. Consequently, this chapter does not address in any detail the Federal law based issues.

It is recognized at the outset that there is a range of legal theories and opinions, each supported by legal analysis, as to the interplay among the Reclamation Act as amended, the ESA, tribal treaties, and state water law. The summary discussion in this chapter does not fully identify all of the nuances of the various legal theories involved. This chapter is an attempt to address the relatively narrow issues associated with local implementation of a program to provide a total of 1,427,000 acre-feet for flow augmentation. It is not intended to portray the legal position of any party.

The current flow augmentation program, which provides 427,000 acre-feet, has been implemented for the most part without the enthusiasm of state officials or Idaho water users. Acquisition of water for the current program follows the principle of acquiring water only from willing sellers and, after 4 years, has managed to permanently acquire approximately 78,000 acre-feet of storage space and natural flow rights. Rental pools and other sources provide the remaining volume. More importantly, this acquisition and delivery program is based upon the cooperative interplay of Federal statutes mandating salmon recovery and state laws establishing state control of water within their borders. The State of Oregon has granted a formal transfer for the use of 17,650 acre-feet of natural flow rights acquired by Reclamation. In addition, Reclamation has obtained interim permission, through an Idaho statute, to acquire and release water allowing the use of the water for downstream flow augmentation. That statute, however, expires on January 1, 2000.

Basin reservoirs have been operated in a manner that has sought to balance competing interests. Such operations naturally create controversy among local interests because of the competing needs for a limited resource. Irrigators, hydropower producers and consumers, reservoir boaters, river floaters, reservoir and river anglers, campers, and others all value the same water resources for their specific objectives and advocate reservoir operation changes to benefit their particular interests. Each of these competing interests are critical of current operations, and resist changes that they perceive diminish the resources they value.

Major questions that need to be addressed in evaluating the acceptability of flow augmentation include the following:

- Would flow augmentation improve salmon and steelhead populations?
- If flow augmentation would improve populations, would flow augmentation be the most cost effective and efficient means?
- What would be the total cost to acquire the volume of water?
- Who would provide the funds, how much, and how soon?
- What would be involved in acquiring the water, and how soon could it be provided?
- Would the states agree to a plan?
- What would the Federal government do if the states or local interests do not agree?

As a contrast to the scenarios analyzed in this document, it is important to note that the current Columbia River flow augmentation is provided from storage space under the exclusive control of Reclamation and the Corps in reservoirs of the FCRPS. Impacts to reservoir fisheries, recreation, and other resources occur, but normal Columbia River flows are of such magnitude that existing water rights holders are not impacted by the Columbia River flow augmentation program.

There is insufficient storage space in the Snake River basin under Reclamation's and the Corps' exclusive control to provide a large amount of water for flow augmentation without significant impacts to natural resources, recreation, and economic sectors. The current 427,000 acre-feet can be provided only through strong reliance on rental pools. Providing larger amounts of water would require the reallocation of existing water rights and/or contract entitlements held by irrigation entities in Idaho and Oregon and, perhaps, in Wyoming and Nevada.

9.1 State Water Law

The Western States obtained ownership of streams and control of the water within each state upon admission to the United States. Section 8 of the Reclamation Act of 1902 recognizes this principle by requiring that the acquisition and use of water for Reclamation projects be governed by state law, unless preempted by Federal law. Section 8 (32 Stat. 390; 43 U.S.C. §§ 372, 383) states:

> "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal government or any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

Reclamation storage and release of water for project purposes has complied with state water law.

State laws regulate the acquisition and the use of water and limit the use of water to beneficial purposes as determined by the state. Water rights are secured in accordance with state water law, and water rights granted by the state are defined in terms of the type of water use, the period of use, the source of water, the location of the point of diversion and place of use, and the rate and total volume that may be diverted, if applicable (some rights do not involve a diversion). Any changes in water use from those described in the water right definition must generally be authorized by the state through an approval of a transfer of water right. Reclamation has secured changes in purpose of use of Oregon natural flow rights and secured interim Idaho legislation approving the use of stored water for flow augmentation.

Watermasters in Idaho and Oregon oversee the local diversion and use of water to assure compliance with water rights of record. These activities tend to be more intense for those stream segments or basins where there is insufficient water to meet all valid water rights. In these cases, the watermasters regulate the diversion of water to assure that the available water supply is distributed to valid rights of record in accord with the prior appropriation doctrine.

Having worked very hard together during the last several years to meet flow augmentation requirements in accordance with state water laws, Reclamation and the states have charted a course away from the contentious issue of potential preemption of state law. Rather than devote precious resources to legal wrangling over the interplay of explicit congressional directives regarding salmon recovery and the 1902 Reclamation Act's Section 8 waiver of sovereign immunity, the states and Reclamation have developed mechanisms to meet flow augmentation needs through state law. Rather than spending energy and staff time responding to water user claims of 5th Amendment takings of private property, Reclamation has worked with water users to develop and consummate sales and rentals of water rights and storage contract entitlements for flow augmentation on a willing seller basis. In return, a state law based scheme to provide flow augmentation has meant that local watermasters are available to assist Reclamation in determining release rates, to account for water released for flow augmentation, and to track flows downstream to assure that the flow augmentation releases are protected from hostile diversion. It remains to be seen whether state cooperation would be forthcoming to meet future flow augmentation needs.

9.2 State Opposition to Flow Augmentation

Flow augmentation to date has been highly contentious. Many State officials, legislators, and water interests begrudgingly cooperated with Reclamation efforts to secure Idaho legislation to approve and protect the release of 427,000 acre-feet for flow augmentation.

Transfers in purpose of use of a water right would first be addressed by the IDWR, to determine the beneficial nature of the new use and assure that other water right holders, junior or senior, are not harmed by the transfer. Idaho law also requires that transfers involving more than 50 cfs or 5,000 acre-feet must be expressly approved by the State Legislature. Discussions with a variety of Idaho governmental and water user interests indicate that a call for 1,427,000 acre-feet for flow augmentation would be considered unacceptable to Idaho and would be strenuously opposed at all levels. It is reasonable to assume, as far as Idaho is concerned, that a flow augmentation commitment of 1,427,000 acre-feet could not be willingly accomplished under the umbrella of State water law.

Idaho opposition to flow augmentation would come not just from irrigation water users. Boise, Twin Falls, Idaho Falls, and other Idaho communities are experiencing significant growth. The Boise valley, for example, is experiencing unprecedented groundwater shortages. United Water Company, which serves the city of Boise, is undertaking an innovative program to acquire irrigation water supplies in order to meet near-term demands for municipal water from additional surface supplies. Potato processors in southern Idaho pump from the declining SRPA which would be negatively impacted by both the 1427i and 1427r scenarios. In addition, minimum reservoir elevations sustain highly valued recreation areas.

Riverflows downstream of key Reclamation reservoirs have served to sustain premier fisheries. The reductions in established reservoir pools and streamflows would impact significant portions of the nonagricultural public. The "local public interest" must be taken into account by the Director of the IDWR in deciding on changes of use, and the local public is likely to strongly oppose potentially detrimental changes in current streamflows and reservoir elevations.

Maintenance of target reservoir elevations and streamflows downstream of key Reclamation dams are integral components to protect water quality. In most cases, the cost of meeting water quality standards with reduced reservoir elevations or streamflows would be very high. For example, one estimate of additional annual water treatment costs that might be incurred to remove increased metal contaminants was between $20-$40 million for the city of Boise alone (Sommers, 1998). The present value of the added cost would be between $60-$120 million.

Oregon involvement in flow augmentation has been in the form of the approval of a change of use associated with natural flow rights along the Malheur and Snake Rivers. This action was accomplished without serious challenge from local water right holders. However, a call for 1,427,000 acre-feet of flow augmentation would require change of use for considerable volumes of Oregon water held in Reclamation reservoirs. Local water right holders could be expected to strenuously oppose such action and the State would be expected to protect other water right holders, junior and senior, from harm as a result of water right changes.

Wyoming has participated in flow augmentation efforts to date only to the extent that storage releases from Jackson Lake have been used to help provide the current 427,000 acre-feet of flow augmentation. In briefings on this analysis of additional flow augmentation, Wyoming officials expressed grave concerns over any efforts to acquire water supplies from Wyoming water users. The Idaho-Wyoming Snake River compact provides that Wyoming may use 4 percent of the flows of the upper Snake River; the remaining 96 percent is allocated to Idaho. A significant use of the Snake River in Wyoming is for recreation at Jackson Lake and on the Snake River downstream. The difficulties in securing changes of use and protection of water in Wyoming would probably be no more imposing than similar efforts would be in Idaho or Oregon. However, the relatively small area of the Snake River basin that lies within Wyoming argues against attempting to acquire any amount of the limited supply of water from Wyoming.

Nevada has not participated in flow augmentation efforts to date. When being briefed on this additional flow analysis, Nevada officials expressed serious concerns about the use of any Nevada water for flow augmentation. Nevada has critical water supply problems. Its allocation of the Colorado River is small in comparison with that of other Colorado River Basin states, and rapidly expanding municipalities, such as Las Vegas and Reno, are in short supply. Snake River basin water has not been considered for use outside the local basin, however, because of local conditions, including the ongoing negotiations to settle the water rights of the Duck Valley Indian Reservation. Securing changes of use and protecting water in Nevada would probably be no more imposing than for similar actions in Idaho or Oregon. However, like Wyoming, the small area of the Snake River basin in the state argues against attempting to acquire any Nevada water.

9.3 Methods of Acquiring Water

The two obvious ways to implement a flow augmentation program are by administrative action and through specific Federal legislation.

9.3.1 Administrative Action

Reclamation has provided 427,000 acre-feet of flow augmentation as an administrative action. The extent of Reclamation's authority was considered in 1995 during development of the BIOP and Reclamation's ensuing ROD. Reclamation concluded that 427,000 acre-feet could be provided as a reasonable and prudent alternative. However, providing 427,000 acre-feet would eliminate most, if not, all of the system flexibility. If not for current system flexibility and careful management, resource and recreation uses would suffer unacceptable impacts under the 427,000 acre-feet operation. Larger volumes were specifically considered, but were not selected.

This analysis reveals that Reclamation can provide 427,000 acre-feet about 82 percent of the time with the resources currently available, including reacquired storage space and acquired natural flow rights. Limited additional water supplies can be acquired under Reclamation's existing authorities to provide increased reliability of providing the 427,000 acre-feet.

This analysis reveals that providing an additional 1 MAF can only be accomplished by imposing never before experienced impacts on project purposes. The potential budgetary impacts are also significant.

An argument can be made that the urgent need to undertake significant salmon protection measures calls for administrative action to reallocate water supplies for ESA purposes under one of the legislative approaches discussed below. While the need for salmon protection is compelling, the passionate and united local opposition to additional flow augmentation volumes and the potential costs would assure court and Congressional oversight of any action to reallocate water. This analysis reveals that Reclamation would not be able to meet its historic obligations and commitments to project beneficiaries or to fully meet all congressionally authorized project purposes while also providing 1,427,000 acre-feet for flow augmentation. Although arguments exist to support an administrative decision to meet flow augmentation requirements at the expense of specific project purposes, legislation appears to be necessary, from a pragmatic if not legal basis, to clarify Reclamation's responsibility in this regard and provide the necessary funding to carry out the reallocation of water.

9.3.2 Legislative Action

As discussed above, legislation could clarify Reclamation's responsibilities under original Reclamation Project authorizing statutes in light of new demands for flow augmentation. Congress could authorize Reclamation to provide an additional 1 MAF for flow augmentation. That authorization would effectively amend the original Reclamation project authorizations by including flow augmentation as a project purpose. Congress would also identify how the water should be provided and authorize and appropriate the required funds.
There appears to be three potential legislative approaches for the acquisition and delivery of water for flow augmentation:

- Invoke the "prior or superior claims" provisions of Reclamation repayment contracts and reallocate stored water for flow augmentation with no reimbursement to project beneficiaries for their loss of stored water.

- Release stored water on the basis that it constitutes a taking, for which compensation (lost income) must be paid.

- Institute a willing buyer/willing seller program.

9.3.2.1 Prior or Superior Claims

Most if not all repayment contracts with water user entities in the basin contain a clause that exempts the United States from liability in the event of shortage of water. One of the causes of shortage is listed as "prior or superior claims." If the prior or superior claims clause were invoked, water would be released from Reclamation project reservoirs on the basis that the ESA need constituted a superior claim. Under this approach, the United States would not be liable for monetary damages associated with the water released.

This approach could be implemented relatively quickly, but the actual release of water could be delayed for an indefinite period due to court actions. Affected water users would undoubtedly fight the release of water by every means possible, including court actions.

One serious downside to this approach is that it would only apply to project water supplies. Thus, it would impose a disproportionate burden on Reclamation project beneficiaries, since the approach does not involve natural flow rights. The controversy associated with this approach would certainly erode support for any changes in Idaho law that would permit the use of privately held natural flow rights.

The extreme degree of contention that would result from this approach is difficult to overstate. Reclamation seeks to fulfill its responsibilities in a manner that engenders cooperation from all affected parties, although agreement of all parties in managing finite water supplies is sometimes not possible. Adoption of a prior or superior claims approach is unlikely to lead to a consensus or even begrudging acceptance. A divisive debate over state and local rights could easily infect efforts to implement this approach.

If water rights in the Snake River basin were reallocated as proposed, it would require Congressional legislation similar to that adopted by Congress for California's Central Valley Project; CVPIA, Public Law 102-575, 106 Stat. 4706 et seq. It is worthwhile to quickly review CVPIA history, since the circumstances involved in the CVPIA enactment have some applicability to the Pacific Northwest. In California, conflicts existed for many years over the operations of Reclamation's Central Valley Project, including estuary water quality problems and ESA listed fish. The reallocation of project water supplies to additional uses was ardently sought by various parties and passionately opposed by project water users. Under the CVPIA, Congress directed the Secretary, through Reclamation, to:

> ". . . dedicate and manage annually 800,000 acre-feet of Central Valley Project water for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title; to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help meet such obligations as may be legally imposed upon the Central Valley Project under State or Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal Endangered Species Act."

Under CVPIA Section 3406(b), Reclamation is to reduce irrigation water supplies to a part of its irrigation contractors by 50 percent in order to meet the purposes of the legislation. However, since these contractors were injured by the reduction in irrigation supplies, they sued the United States to determine among other things whether an article in the parties' water service contract was valid and whether it would excuse the government from liability for water shortages due to "any other causes" (i.e., reductions due to enactment of the CVPIA).

On appeal, the Ninth Circuit Court of Appeals found that the provision was valid and that it did absolve the United States from liability for reduced irrigation deliveries especially when the provision was read together with the contractors' option to renegotiate its contract when Congress amends the provisions of Reclamation laws. *O'Neil v. United States*, 50 F.3d 677, 688 cert. denied, 516 U.S. 1028 (1995). The

court stated: "We conclude that the contract's liability limitation is unambiguous and that an unavailability of water resulting from the mandates of valid legislation constitutes a shortage by reason of 'any other causes.'" *O'Neil*, 50 F.3d at 684.

It should be noted that the Central Valley contracts differ from those used in the Snake River basin in Idaho and Oregon. In particular, almost all contracts used in the Snake River basin are permanent repayment contracts that are not subject to renegotiation, whereas CVPIA contracts are water service contracts which have a set term for contract duration. Whether the contract differences would result in a different decision by the court is open to debate.

Implementation of this approach would likely involve the following steps:

- Congress would authorize the reallocation of project water supplies similar to the CVPIA.
- The Bureau of Reclamation would prepare rules and regulations outlining the criteria for selecting flows to be used for flow augmentation.
- Reclamation would complete an EIS on the rules and regulations.

9.3.2.2 Taking

As an alternative to exercising the prior or superior claims provision of contracts, Congress might direct Reclamation to release contracted water for flow augmentation, subject to claims for damages. This approach could be implemented relatively quickly but would also likely become involved in the courts. The water users might seek to enjoin Reclamation from releasing water until the matter was resolved.

The political implications of a taking would be severe, but possibly not as dramatic as the prior or superior claims approach, and there could be opportunities for voluntary release of water by natural flow or storage right holders.

Funding could come from direct Congressional appropriations or the BPA. However, the $435 million per year BPA cost cap for fish and wildlife already is fully allocated to various projects.

A taking would likely be implemented through passage of legislation similar to the CVPIA with the proviso that the Federal government would be liable for damages for water supplies it would make available for flow augmentation, and the appropriation of funds to cover anticipated costs. The costs of acquisition under this approach would likely be in the low range of possible acquisition costs identified in chapter 6 (from $10 million to $31 million per year for the 1427i scenario and $31 million to $87 million per year for the 1427r scenario). Further detail on potential acquisition costs is provided in chapter 6.

This approach could be implemented through the following steps:

- Congress would authorize the reallocation of project water supplies similar to the CVPIA, with general criteria on when the use of water for flow augmentation would constitute a taking.

- The Bureau of Reclamation would prepare rules and regulations outlining the criteria for selecting storage supplies to be used for flow augmentation, and other matters.

- Reclamation would complete an EIS on the rules and regulations.

9.3.2.3 Willing Buyer/Willing Seller

The current flow augmentation program acquires water through a willing buyer/willing seller approach. This approach would be the most benign from a social/political perspective, although experience indicates that local opposition could occur. Other advantages include the possibility of targeting certain water supplies (i.e., natural flows, non-Federal storage, diversions in the salmon migration corridor, etc.).

A major downside to this approach is the length of time to implement. It would take several years to obtain a large volume of water. For example, purchase of 1 MAF, about one-sixth of the consumptive use in the Snake River basin, would arguably require purchase of water rights for about one-sixth of the irrigated farmland. This amount of farmland would not likely be placed on the market for several years unless the willing purchase price is greatly inflated over historic price offerings.

The cost of this approach would be greater than that under the taking approach. Funding needs can be determined only through real-world water acquisitions, but common sense and experience argue that water right prices would increase dramatically and rapidly. Colorado has an active water market with water costs of thousands of dollars per acre-foot. The demand for water by Colorado cities has raised bid prices far above those for irrigation water. The minimum market value might be $57 million per year for the 1427i scenario and $82 million per year for the 1427r scenario. Market values could approach or even exceed $71 million per year for the 1427i scenario and $190 million per year for the 1427r scenario (see chapter 6 for additional detail)

Another factor that warrants consideration is significant volumes of water would need to be acquired from irrigation entities, rather than individual water users. Reclamation Law for many decades has favored the contracting of project water supplies to irrigation entities. The hydrology analysis reveals that providing 1,427,000 acre-feet for flow augmentation requires reallocation of very large volumes of water stored in Reclamation reservoirs. Essentially all of that water is held by irrigation entities, as opposed to individual contractors. Water supplies in Reclamation reservoirs in Oregon are held by irrigation districts organized under Oregon Law. In Idaho, canal companies, irrigation districts, other water-user organizations, and a few individuals hold contract entitlements to water supplies. However, the majority of the storage space is held by large irrigation entities consisting of hundreds or thousands of patrons.

There is certainly reason to argue that individuals will make sound economic decisions–many water users would be willing to sell their water supply if it can be sold for a value that equals or exceeds the income that would have been realized by using the water for agriculture. Water rights and contract entitlements held by water user entities, however, must be sold by the entity. The directors of such organization tend to consider the needs of the entire entity and not the needs of any one individual. This institutionalizing of decision making concerning water potentially available for sale would, thus, appear to reduce the ease and increase the cost of water to be acquired.

Another area of concern is Idaho's current reticence to enact legislation that would permit the transfer of natural flow or storage rights to instream purposes. Without the ability to rely on water supplies from Idaho, Reclamation could not provide 1,427,000 acre-feet. It appears that any decision to provide 1,427,000 acre-feet would need to be made over Idaho's objection. This would require a deviation from the 1995 BIOP and ROD which require that flow augmentation be accomplished in accordance with state water law.

A fast-track approach, which may keep total costs lower and provide more water at an early date would likely involve most or all of the following steps:

- Congress would authorize a one-time buyout of water rights and appropriate sufficient funding to acquire the water. The legislation would also require that state water administrators cooperate in the use of water for flow augmentation. However, it is recognized that Congressional action to require state cooperation in water reallocation would not be guaranteed. There is considerable tension over whether the Federal government or the states should have the final say in allocating water. Many Senators of Western States could be expected to defend state sovereignty over water.

- Federal agencies would prepare rules and regulations outlining the criteria for participation and the process to be followed.

- Federal agencies would complete an EIS on the rules and regulations.

- Water users would submit bids, describing how much water they would be willing to sell and the price (the actual bid process could require all bids at one time or in phases).

No long-term, willing-seller water acquisition has occurred in the Western States at a scale comparable to what is being assessed in this analysis. The logistics and cost of negotiating acquisition contracts at this scale would have to be addressed prior to implementation. Verification and enforcement of agreements to change diversion and use of irrigation water could present problems. Third-party impacts on farm workers and suppliers as well as financial impacts of lost revenue and increased social services costs to local governments are discussed elsewhere in this analysis. These indirect impacts could generate significant opposition that would tend to erode the user-friendly nature of a willing seller program. Details of operational changes required to manage reduced irrigation water delivery also would have to be examined.

9.4 Protection and Delivery of Flow Augmentation Water

Water acquired in upstream states would need protection from hostile diversion in all states through which the water must pass. With no comprehensive interstate allocation of the Columbia and Snake Rivers, Federal water managers are challenged to secure such state-to-state protection. Whether each state can be compelled to protect contributions from upstream states is a question that has been avoided to date (due in part to moratoria on new diversions in Washington and Oregon). One question which has not been answered is whether any state in the Columbia River Basin would, in a water-short year, curtail diversions of existing state water rights holders, so that flow augmentation water from an upstream state could be protected instream. Without such voluntary state protection of augmentation flows, one must consider whether some Federal legal mechanism might be available to accomplish the same end.